

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

Conservatorship of the Person of
FRANCINE S.

CHRISTINE S., as Conservator, etc.,

Petitioner and Respondent,

v.

GRACE S.,

Objector and Appellant.

D040185

(Super. Ct. No. MH88 635)

APPEAL from an order of the Superior Court of San Diego County, Howard H. Shore, Judge. Affirmed. Request for sanctions granted.

This action arises out of a conservatorship proceeding under the Lanterman-Petris-Short Act (Welf. & Inst. Code, § 50000 et seq.) (LPS Act) for the reestablishment of the

conservatorship of Francine S.,¹ a 30-year-old developmentally disabled woman. The objector Grace S. is Francine's mother and the petitioner Christine S. is Francine's fraternal twin sister and her conservator. In February 2002 Grace filed a petition seeking to be named a "successor" conservator instead of and in place of Christine as of June 2002 when Francine's conservatorship was to be renewed. In May 2002 the court found that Christine should remain as Francine's conservator and denied Grace's petition.

Grace appeals from the court's denial of her petition seeking to be named successor conservator and the order reappointing Christine as Francine's conservator. Although not entirely clear, Grace's appeal appears to assert² that it was error to deny her petition because (1) the court used the wrong standard of proof in determining who should be Francine's conservator; (2) there was no evidence presented that Francine was gravely disabled; (3) the court improperly found Francine incompetent to testify in the proceeding; and (4) the court should have followed the legislative preference for a parent over a sibling as a conservator. In addition to opposing Grace's appeal on the merits, Christine argues that Grace is without standing to pursue this matter. Christine has also filed a motion for sanctions against Grace's appellate counsel, arguing that counsel has

¹ The parties are referred to by their first names in this opinion as they share the same last name and, under the LPS Act, a conservatee's identity is not to be disclosed. (See, e.g., *Conservatorship of Susan T.* (1994) 8 Cal.4th 1005, 1008, fn. 1.)

² The problems with Grace's appeal are addressed in more detail in the discussion regarding Christine's request for sanctions, *post*.

failed to follow the rules of court in preparing her brief and that the appeal is frivolous. Grace did not file a reply brief and did not respond to Christine's request for sanctions.

We conclude that Grace does have standing to pursue this matter. However, we further conclude that (1) any error in the standard of proof used by the trial court was harmless; (2) there was no need to find Francine gravely disabled as all parties stipulated to that fact; (3) the court did not err in determining that Francine was incompetent to testify; and (4) the court properly reappointed Christine as conservator for Francine. We also order Sandra Smith, appellate counsel for Grace, to pay sanctions to Christine in the amount of \$500.³

FACTUAL AND PROCEDURAL BACKGROUND

A. Factual Background

Francine is a 30-year-old developmentally disabled female. Grace is Francine's mother. Christine is Francine's fraternal twin sister.

An LPS conservatorship was first ordered for Francine in May 1997. A public conservator was initially appointed. However, in October 1997, Christine was substituted in as a successor conservator. Every year since then the conservatorship of Francine was renewed, and Christine remained as Francine's conservator.⁴

³ Based upon our holding in this case, we need not address Christine's additional argument that Grace's appellate counsel has a conflict of interest because she previously attempted to substitute in as Francine's attorney in this action.

⁴ LPS conservatorships are renewed on a yearly basis.

B. Procedural Background

In February 2002 Grace filed a petition to have herself appointed as "Successor Conservator of Francine" In that petition Grace asserted that (1) Francine had lived with her during most of the time Christine had been conservator; (2) Christine was not adequately caring for Francine; and (3) Grace was worried Christine only wanted to be Francine's conservator to use her kidney for a transplant that Christine allegedly needed. Grace further asserted that Francine had been subjected to questionable mental health care, that she was sexually molested as a result of improper supervision, and that Grace would be able to provide proper care for her. The petition requested that Grace be appointed conservator of Francine for a one-year period from June 1, 2002 to May 30, 2003.

A hearing was held on Grace's petition in March 2002. At that time county counsel appeared on behalf of the public conservator, the public defender's office appeared on behalf of Francine, and Christine appeared in propria persona. Grace was represented by counsel.⁵ Additionally, Grace's appellate counsel, Sandra Smith, appeared and attempted to substitute in as counsel of record for Francine. The court rejected that request on the basis that there was no evidence Francine wanted or needed a new attorney in place of the public defender. Because the petition sought to have Grace appointed as the new conservator as of the end of the then-current conservatorship (May

⁵ Matthew Palmer.

31, 2002), the court continued the matter to a date closer to the end of that year's conservatorship.

In May 2002 the court heard Grace's petition. At the beginning of the hearing the court and counsel discussed the court investigator's report, which recommended that Christine be reappointed as conservator. Counsel for Grace confirmed that he had a copy of the report and provided it to the court for its review.⁶ All parties, including Grace, stipulated that Francine was gravely disabled. The court then stated, with regard to Grace's burden of proof in seeking to remove Christine as conservator of Francine, that she must show "beyond a reasonable doubt that it is in the patient's best interest to substitute a new and different conservator."

Grace called several witnesses in support of her petition. Grace first called Peter S., the brother of Francine and son of Grace. Peter testified concerning Grace's care for Francine when Francine was living with her. Grace also sought to establish that Peter had written a letter in December of 2000 recommending that Grace be appointed as Francine's conservator. However, Peter explained that it was contingent upon his mother providing better for Francine's medical and emotional needs than she had in the past, and Grace taking better care of herself, and he had only prepared it under pressure from his mother.

⁶ As we shall discuss, *post*, the report was not provided to this court as part of the record on appeal.

Grace called Lillian Jimenez, a former babysitter for Francine, to testify on her behalf. Jimenez testified concerning her observations of Francine and Christine's care for her when she was working as a babysitter. Jimenez testified that at times Francine appeared unhappy and once Francine wrote a note saying she wanted to live with her mother. However, Francine never communicated to Jimenez how she was being cared for by Christine.

Grace also testified in support of her petition. Grace testified concerning her own care for Francine when she lived with her. Grace testified that she believed that she would be a better conservator for Francine than Christine.

Grace called Christine to testify. Counsel for Grace questioned Christine about a period of time when Christine was conservator that she had let Francine live with her mother Grace. She testified that she allowed Francine to live with Grace at that time because Grace was continuously asking for Francine to live with her. Christine also testified that her mother was harassing her concerning Francine and would report her to government authorities. Counsel for Grace sought to establish that Christine's motivation for being Francine's conservator was the government assistance she received. Counsel also asked Christine if she had any knowledge of Francine claiming her older half-brother raped her. Christine vehemently denied any such knowledge.

Grace also attempted to call Francine to testify. Counsel for Grace wished to question Francine concerning notes that she had purportedly written. However, Francine, because of her condition, in particular the fact that she could not speak, appeared unable to authenticate them. The court attempted to question her concerning the notes, first by

having her nod or shake her head in response to questions. When that was unsuccessful, the court tried to have her hold up "Yes" and "No" signs in response to questions. However, when asked questions, Francine would nod her head affirmatively to each question instead of holding up a card.

At the suggestion of Grace's counsel, the court took Francine into chambers to question her alone. When the trial judge returned he explained that he had questioned Francine and that Francine had responded to each question with a nod of her head. Some of the questions were ones that, if understood, would have called for a "No" answer. The court concluded that Francine was unable to competently testify and lay a foundation for the notes. The court ruled that the notes therefore would not be admitted into evidence.

The court listened to argument from counsel concerning Grace's petition. The court then ruled on Grace's petition. The court first indicated that it relied upon court investigators in such cases because they are "highly experienced" and impartial. The court also noted that in general a parent takes priority over a sibling in the appointment of conservators. However, the court found that the LPS Act gave the court a lot of "latitude" in picking a conservator and the priority for parents did not apply if the court investigator recommended otherwise. The court also noted the "discretion" it had to rule in the best interests of a conservatee. The court found that the court investigator's report favored retention of Christine as conservator. The court pointed out that the report referenced "contacts" Grace had had with both the public defender's office and the court investigator. The court quoted from the report that "'Neither the public defender, nor the court investigator have been favorably impressed with [Grace].'" The court stated that it

took the court investigator's comments "seriously." In assessing who could better care for Francine the court weighed the fact that Christine might be working full-time against the fact that Grace was already caring for her other developmentally disabled daughter. The court also indicated that there was no evidence to support the allegation of a sexual assault alleged in the petition. Finally, the court indicated that if there was any evidence of problems with the conservatorship in the future, a follow-up investigation could be conducted. The court ruled that Christine would remain as conservator of Francine.

This timely appeal followed. On May 1, 2003, during the pendency of this appeal, the annual conservatorship of Francine was renewed. Christine was reappointed Francine's conservator for the time period of May 1, 2003 through April 30, 2004.

DISCUSSION

I. Mootness of Appeal

Because the conservatorship of Francine has now been renewed for another year, the appeal challenging last year's appointment of Christine as conservator is technically moot. However, Christine's request for sanctions against counsel for Grace is not. Moreover, we exercise our discretion to nevertheless address Grace's appeal on the merits because (1) the merits of the appeal are relevant to our decision on the sanctions request; and (2) the proper standard of proof applicable to the conservatorship proceeding in this matter is an issue that may be of continuing interest to the trial court. (*Chantiles v. Lake Forest II Master Homeowners Assn.* (1995) 37 Cal.App.4th 914, 921.)

II. *Merits of Appeal*

A. *Applicable Authority*

Welfare and Institutions Code section 5350 provides in part that:

"A conservator of the person, of the estate, or of the person and the estate may be appointed for any person who is gravely disabled as a result of mental disorder or impairment by chronic alcoholism. [¶] *The procedure for establishing, administering, and terminating a conservatorship under this chapter shall be the same as that provided in Division 4 (commencing with Section 1400) of the Probate Code, except as follows:* [¶] . . . [¶] (b)(1) Appointment of a conservator under this part, including the appointment of a conservator for a person who is gravely disabled . . . *shall be subject to the list of priorities in Section 1812 of the Probate Code unless the officer providing conservatorship investigation recommends otherwise to the superior court.*"⁷ (Italics added.)

Probate Code section 2651⁸ provides that "[t]he ward or conservatee, the spouse of the ward or the spouse or domestic partner of the conservatee, *any relative or friend of the ward or conservatee*, or any interested person may apply by petition to the court to have the guardian or conservator removed. The petition shall state facts showing cause for removal." (Italics added.)

Section 2680 provides that, "[w]hen for any reason a vacancy occurs in the office of conservator, the court may appoint a successor conservator in the manner provided in this article." Section 2681 provides in part that a "petition for appointment of a successor

⁷ The statute lists several exceptions that are not governed by the Probate Code, none of which are applicable here.

⁸ All further statutory references are to the Probate Code unless otherwise specified.

conservator may be filed by any of the following: [¶] . . . [¶] (c) *A relative of the conservatee.*"

Section 2650 lists the grounds for removal of a conservator:

"A guardian or conservator may be removed for any of the following causes: [¶] (a) Failure to use ordinary care and diligence in the management of the estate. [¶] (b) Failure to file an inventory or an account within the time allowed by law or by court order. [¶] (c) Continued failure to perform duties or incapacity to perform duties suitably. [¶] (d) Conviction of a felony, whether before or after appointment as guardian or conservator. [¶] (e) Gross immorality. [¶] (f) Having such an interest adverse to the faithful performance of duties that there is an unreasonable risk that the guardian or conservator will fail faithfully to perform duties. [¶] (g) In the case of a guardian of the person or conservator of the person, acting in violation of any provision of Section 2356.⁹ [¶] (h) In the case of a guardian of the estate or a conservator of the estate, insolvency or bankruptcy of the guardian or conservator. [¶] (i) In any other case in which the court *in its discretion* determines that removal is in the best interests of the ward or conservatee"

The removal of a guardian for any of the reasons specified in section 2650 rests within the broad discretion of the court. (*In re Howard's Estate* (1955) 133 Cal.App.2d 535, 539.)

Additionally, section 1812 provides the following order of preference for persons proposed to act as conservators:

"(a) . . . [T]he selection of a conservator of the person or estate, or both, is *solely in the discretion of the court* and, in making the selection, the court is to be guided by *what appears to be for the best interests of the proposed conservatee*. [¶] (b) . . . [O]f persons *equally qualified in the opinion of the court to appointment as*

⁹ Section 2356 involves involuntary commitment in mental institutions and unauthorized prescription of experimental medications.

conservator of the person or estate or both, preference is to be given in the following order: [¶] (1) The spouse or domestic partner of the proposed conservatee or the person nominated by the spouse or domestic partner [¶] (2) An adult child of the proposed conservatee or the person nominated by the child [¶] (3) A parent of the proposed conservatee or the person nominated by the parent [¶] (4) A brother or sister of the proposed conservatee or the person nominated by the brother or sister" (Italics added.)

B. *Standing*

Christine argues that we should not consider this matter on the merits as Grace did not have standing to seek to replace Christine with herself as conservator of Francine. Christine argues that there is no authority allowing a third party to intervene in a conservatorship proceeding and apply to become conservator and also that Welfare and Institutions Code section 5361 only allows a current LPS Act conservator to apply for a reappointment. We reject this contention.

Grace's petition sought to remove Christine as conservator and thereafter replace her with Grace as the successor conservator. Therefore, under the terms of sections 2651 (governing removal) and 2681 (governing appointment of a successor), Grace, as Francine's mother, had standing to pursue her petition seeking Christine's removal as conservator and her replacement as successor. Accordingly, Christine's standing argument is unavailing.

C. *Standard of Proof*

Grace asserts that the denial of her petition must be reversed as the court erred in finding that she needed to prove beyond a reasonable doubt that it was in the best interests of the conservatee to remove Christine as conservator and replace her as the new

conservator. We agree that the court applied the wrong standard of proof on this matter. However, based upon the record of this proceeding, we conclude that the court did not abuse its discretion in denying Grace's petition and therefore the error was harmless.

As specified in section 2650, trial courts have the "discretion" to remove a conservator at any time "in the best interests" of the conservatee. In applying the proof-beyond-a-reasonable-doubt standard to Grace's petition, it appears that the court was confused with the initial determination that a proposed conservatee is "gravely disabled." That determination, whether initially or upon renewal of a conservatorship, must be upon proof beyond a reasonable doubt. (*Conservatorship of Johnson* (1991) 235 Cal.App.3d 693, 696.)

Here, however, all parties stipulated that Francine was gravely disabled. The only issue in dispute was whether it was in Francine's "best interests" to have Christine removed and Grace appointed as the successor conservator. That question was within the discretion of the court, not subject to proof beyond a reasonable doubt

Notwithstanding the court's error in applying an incorrect standard of proof, we need not reverse the court's order here. First, although initially the court cited an incorrect standard of proof, it appears the court actually applied the correct standard, citing the correct statutory authority and indicating that the statutes gave it "a lot of latitude" in making its decision. The trial judge also stated that he had "a great deal of discretion" in making the decision because "the primary focus of a conservatorship is to determine the best interests of the conservatee." Therefore, it appears that the court

actually recognized that its decision was discretionary and based upon a "best interests" standard.

Moreover, there is nothing in the record supplied by Grace indicating that the court did not actually act within its discretion in determining that Christine should remain as Francine's conservator. The court properly relied upon the court investigator's report (see Welf. & Inst. Code, § 5350, subd. (b)(1), *ante*) that recommended that Christine remain as conservator. Grace has not supplied a copy of that report as part of the record on appeal, and therefore cannot challenge its findings. A trial court's exercise of discretion will not be disturbed on appeal where an appellant fails to provide a record sufficient to determine whether the result would have been different in the absence of the alleged trial court error. (*Nelson v. Anderson* (1999) 72 Cal.App.4th 111, 136.) "[I]f the record is inadequate for meaningful review, the appellant defaults and the decision of the trial court should be affirmed." (*Gee v. American Realty & Construction, Inc.* (2002) 99 Cal.App.4th 1412, 1416.)

Moreover, Grace has not pointed to any other evidence in the record that would demonstrate an abuse of discretion in this case. A review of what record is available (the testimony of Grace's witnesses) does not demonstrate that the court abused its discretion in retaining Christine as conservator. Grace's assertions concerning the quality of Christine's care for Francine were speculative and unsupported by admissible evidence. Accordingly, any error by the court in applying an incorrect standard of proof is harmless and the order must be affirmed.

D. Finding of Grave Disability

Grace also asserts that the court erred in finding that Francine was "gravely disabled" within the meaning of the LPS Act. However, the parties stipulated to the finding of grave disability and therefore that issue has been waived. (*Nevada County Office of Education v. Riles* (1983) 149 Cal.App.3d 767, 779.)

E. Court's Finding That Francine Was Incompetent To Testify

Grace asserts that the court erred in finding that Francine was incompetent to authenticate her notes Grace sought to admit in support of the petition. We reject this contention.

Evidence Code section 701 provides in part:

"(a) A person is disqualified to be a witness if he or she is: [¶] (1) Incapable of expressing himself or herself concerning the matter so as to be understood, either directly or through interpretation by one who can understand him [or her]; or [¶] (2) Incapable of understanding the duty of a witness to tell the truth."

The court's decision on the competency of a witness to testify is reviewed for an abuse of discretion. (*Stanchfield v. Hamer Toyota, Inc.* (1995) 37 Cal.App.4th 1495, 1507.) We find no abuse of discretion here.

The court was presented with Francine, a developmentally disabled woman who the parties stipulated was gravely disabled, and who was also mute. The court attempted to communicate with her first through questions calling for a nod or shake of the head, then with cards for her to hold up to indicate an affirmative or negative response. Francine could not or would not hold up the cards and met each question, no matter what the subject, with nods of her head. The court went further and questioned her in

chambers, the substance of which the judge then placed on the record. Grace has presented no evidence that Francine could communicate or understand her duty to tell the truth. Thus, the court did not err in excluding Francine's testimony.

F. Statutory Preference for Parent as Conservator

Grace contends that the court ignored section 1812's preference for parents over siblings in the appointment of conservators. We reject this contention.

First, section 1812's statutory preference for parents over siblings to act as conservator does not apply if "the officer providing conservatorship investigation recommends otherwise to the superior court." (Welf. & Inst. Code, § 5350, subd. (b)(1).) As the court noted, the court investigator's report recommended continued placement with Christine.

Grace asserts that the investigator "gave no reason for preferring sibling Christine" as the conservator. However, as discussed, *ante*, Grace has failed to make the investigator's report a part of the record on appeal and therefore may not complain about any asserted deficiencies therein.

Further, section 1812 states that the preference for a parent over a sibling only applies as to proposed conservators that are "equally qualified." (§ 1812, subd. (b).) Here, the court investigator and the court at least impliedly found that Christine was the better qualified to act as Francine's conservator. Grace, who bore the burden of proof on this petition, presented no evidence that she was equally or better qualified than Christine to act as Francine's conservator. On appeal, she merely makes an unsupported accusation concerning Christine's "violence and hysteria." Since Grace has neglected to provide the

court with a citation to any record of such "violence and hysteria" by Christine, we cannot rule upon such an assertion.

III. *Request for Sanctions*

In addition to opposing this appeal on the merits, Christine argues that we should impose sanctions against Grace's appellate counsel for (1) violations of the Rules of Court; and (2) because this appeal is frivolous. We conclude that sanctions are warranted in this case.

California Rules of Court, rule 27(e) provides that:

"(1) On a party's or its own motion, a Court of Appeal may impose sanctions, including the award or denial of costs, on a party or an attorney for: [¶] (A) taking a frivolous appeal or appealing solely to cause delay; [¶] (B) including in the record any matter not reasonably material to the appeal's determination; or [¶] (C) committing any other unreasonable violation of these rules."

The standard for determining sanctions for an appeal taken to harass or for the purposes of delay is subjective. The focus is on the subjective good or bad faith of the appellant. (*Marriage of Flaherty* (1982) 31 Cal.3d 637, 649-650.) The test for determining if an appeal is frivolous is objective. The inquiry under this test is whether any reasonable attorney would agree that the appeal is totally and completely devoid of merit. (*Ibid.*)

The text of an appellant's brief may provide evidence of the frivolousness of an appeal: "[Attorney for Appellant] has asserted little, if any, evidence or legal support for any of [appellant's] causes of action. The briefs state the record loosely, cite strained authorities, and discuss legal principles in a vacuum. Moreover, . . . the case is replete

with inconsistent conclusions and/or evidentiary allegations, cradled in opportunism to circumvent [respondent's] clear defenses" (*Kurokawa v. Blum* (1988) 199 Cal.App.3d 976, 996.) Further, even if an appeal raises some meritorious issues, sanctions may be imposed where one or more frivolous claims constitute a "significant and material part of the appeal." (*Maple Properties v. Harris* (1984) 158 Cal.App.3d 997, 1010, italics omitted.)

Appellate courts have imposed sanctions for "unreasonable" violations of the rules of court for such things as failure to cite to the record and controlling authority. (*Pierotti v. Torian* (2000) 81 Cal.App.4th 17, 29-31; *Alicia T. v. County of Los Angeles* (1990) 222 Cal.App.3d 869, 886 (*Alicia T.*)). The court rule most often cited as being the basis for sanctions for violating the rules of appellate practice is California Rules of Court, rule 14, which provides in part:

"(a) [Contents] [¶] (1) Each brief must: [¶] (A) begin with a table of contents and a table of authorities separately listing cases, constitutions, statutes, court rules, and other authorities cited; [¶] (B) state each point under a separate heading or subheading summarizing the point, and support each point by argument and, if possible, by citation of authority; and [¶] (C) support any reference to a matter in the record by a citation to the record."

Here, Christine argues that sanctions are appropriate both for a violation of court rules and because the appeal is frivolous and brought to "harass" her. With regard to the violation of the rules of court, Christine points to Grace's brief, which, to put it charitably, is largely incoherent and violates Rules of Court, rule 14(a) in numerous places. The table of contents identifies four issues upon the appeal (misabeled as numbers I, II, I and II). However, in the body of the brief there are only three subheadings, one consisting

only of a roman numeral "III" stuck in the middle of the text. There are several instances of statements of legal principles without citations to authority. Counsel makes factual statements in the argument section of her brief concerning the proceedings below, but without citation to the record. There are legal issues raised in sentences that are then not supported by citation to evidence or authority. Most egregious, counsel has not provided this court with the court investigator's report as part of the record on appeal, although she refers to it repeatedly and challenges its findings. We agree with counsel for Christine that the manner in which the brief is drafted makes it difficult to determine exactly what issues are being raised by Grace and that it makes the appeal difficult to respond to and for this court to address.

On the subjective aspect of whether the appeal was brought to harass or delay, there is no indication that delay was the motivation for this appeal. There was no judgment for damages that has been stayed, and Christine's one-year appointment as conservator was renewed at the beginning of May 2003. Rather, Christine argues that the appeal is motivated by harassment. Christine submits her declaration as to the history of her dispute with her mother over the conservatorship of Francine, the harassment she has allegedly received at the hands of her mother, and argues that the appeal is merely a furtherance of those actions. The problem with this argument is that the motion for sanctions is directed at only Grace's appellate counsel, not her mother. There is no indication that counsel has any personal motivation to harass Christine.

On the objective standard of frivolousness, Christine concedes that at least the issue of the court's application of the wrong standard of proof has merit. We agree that

the remainder of the brief is confusing, disjointed and in some portions borders on the frivolous. However, the controversy being factually based, and Grace having produced witnesses that, if believed, would have given her case at least minimal merit, does not compel a finding of frivolousness under the objective standard.

The real issue is the appellant's brief and the extra time and effort it caused Christine to respond and this court to review and analyze, as well as counsel's failure to prepare an adequate record on appeal. We believe that sanctions are warranted for counsel's violations of these most basic rules of appellate practice. However, counsel for Christine's request for attorney fees in the amount of over \$13,000, plus additional sanctions of \$5,000, is excessive to remedy this violation. Sanctions against appellate counsel in the amount of \$500, payable to Christine,¹⁰ are appropriate for the violations of the Rules of Court and appellate practice at issue here.

¹⁰ Based upon counsel's violations we could order that the sanctions be paid instead to this court, or impose additional sanctions, to defray the extra cost to taxpayers to process this appeal. (See *Alicia T*, *supra*, 222 Cal.App.3d at pp. 885-886.) However, we believe that sanctions should be payable to Christine to defray at least some of the costs she incurred in defending this appeal.

DISPOSITION

The order denying Grace's petition to appoint a successor conservator is affirmed. Sandra Smith, appellate counsel for Grace, is ordered to pay \$500 in sanctions to Christine. Christine is to recover her costs on appeal.

NARES, Acting P. J.

WE CONCUR:

HALLER, J.

McINTYRE, J.